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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ROVIDIO RECINOS ESPANA, Defendant and Appellant.	B196861 (Los Angeles County Super. Ct. No. BA290826)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ruth Ann Kwan, Judge. Affirmed.

Jeff Price for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Rovidio Recinos Espana appeals from a judgment of conviction entered after a jury trial. Defendant was charged in count 1 with the murder of William Armistead (Pen. Code, § 187, subd. (a)), in count 2 with the murder of Courtney Whaley (*ibid*.), and in count 3 with the possession of a firearm by a felon (*id*., § 12021, subd. (a)(1)). A jury found defendant not guilty on count 1 and guilty on count 3. It deadlocked on count 2, and the court declared a mistrial as to that count.

Defendant was retried on count 2. A jury convicted him of second degree murder and found true the allegations he personally used a firearm (Pen. Code, § 12022.53, subd. (b)), and personally and intentionally discharged a firearm (*id*., § 12022.53, subd. (c)), causing great bodily injury and death to the victim (*id*., § 12022.53, subd. (d)). The trial court sentenced defendant to 15 years to life for the murder, with an additional 25 years to life for firearm use causing great bodily injury and death, and a concurrent term of 2 years on count 3.

On appeal, defendant contends the trial court erred in declaring a mistrial as to count 2, and retrial on that count was barred by collateral estoppel. He also claims instructional and evidentiary error, and that the evidence is insufficient to support the judgment. We affirm.

FACTS

A. *Prosecution*

Defendant owned a convenience store near the corner of San Pedro and 68th Streets in Los Angeles. He worked there along with his wife and his sister-in-law, Norma Rodriguez (Rodriguez).

On September 24, 2005, William Armistead (Armistead) came into the store to make a purchase. He heard Rodriguez talking to another cashier in Spanish. He thought

they were talking about him and made a crude threat to do something to Rodriguez the next time he heard her talking about him.

The following day, Armistead came into the store with Courtney Whaley (Whaley). Rodriguez was working as a cashier and had a number of people in line waiting to be helped. Armistead acted like he wanted to be helped before them, and Rodriguez told him to get in line. Armistead got mad and left the store. Rodriguez pointed Armistead out to defendant as the man who had been rude to her the previous day.

Defendant left the store after Armistead. Rodriguez heard voices and then gunshots. She saw Armistead on the ground. She called her sister and her father. Then she told defendant he should leave the area, and he left.

Maria Lagunas (Lagunas) lived near the store. She heard the gunshots and looked out her window. She saw Armistead and two other men come out of the store. Then she saw defendant come out of the store and shoot Armistead. Armistead grabbed his chest and fell to the ground. Lagunas saw Armistead's hands at the time he was shot, and he was not holding a weapon.

Lagunas saw defendant go back into the store then come outside again. Defendant grabbed Armistead's legs and dragged him into the store. Lagunas called the police and reported the shooting.

Armistead's friend Jorel Neal (Neal) had driven Armistead to the store then gone to park his car. As he was walking toward the store, he heard four or five gunshots. He saw Whaley running toward him. He took Whaley to his car and noticed that Whaley was bleeding from his chest. At Whaley's request, Neal drove him to his house and told Whaley's family that Whaley had been shot.

Whaley's sister heard Neal cursing defendant from outside the house. When she went outside, she saw Whaley lying in Neal's car, bleeding from his nose and mouth. She called 911.

The police and paramedics arrived at Whaley's house. The paramedics transported Whaley to the hospital, where he was pronounced dead from gunshot wounds

to the chest, back and arm. The wound to his chest was a contact wound, meaning that the gun was in contact with his body at the time the shot was fired. The other two gunshot wounds were not made at close range.

Police and paramedics also responded to defendant's store. The paramedics found Armistead on his back in the store. Armistead was shoeless, but there was a pair of shoes outside the store, suggesting that he had been dragged into the store after he was shot. He was taken to the hospital where he was pronounced dead from a contact gunshot wound to his chest.

Los Angeles Police Officer John Redican found an empty .45 caliber semiautomatic handgun on a newspaper rack near the store entrance. Later, .45 caliber bullets and a magazine for the handgun were found in the store's rear storage room. Officer Redican asked Rodriguez if she had seen or heard the shooting. At first, she did not respond. She later answered that she had not.

Police interviewed Lagunas, who initially denied seeing the shooting because she did not want to get involved. Eventually, she told investigators from the District Attorney's office what she had seen.

Police interviewed Neal. Neal said that Whaley told him defendant shot him.

Several hours after the shooting, defendant turned himself in to the police. He told Los Angeles Police Detective Frank Weber that he had a gun in his truck. The truck was searched, and the .38 caliber revolver that killed Armistead and Whaley was recovered.

In an interview, defendant said he killed Armistead and Whaley. He explained that for a long time, gang members had been pressuring him for money. He got into an argument with two men who had been rude to Rodriguez. One of them pushed him, and it was "too much" for him. He thought they were going to hit him. He shot one of the men with a .38 caliber revolver that he had in his back pocket. After that, everything "went blank." Rodriguez told him to leave the store because he would go to prison. He left the store, got into his truck and drove around, crying, before turning himself in.

B. ***Defense***

Prior to the day of the shooting, defendant was approached several times by members of the East Coast Crips, who demanded that he pay them "taxes" for operating his store in their territory. One of the gang members, Armistead, warned him that if he did not pay the "taxes," bad things could happen. Armistead raised his shirt to display a handgun tucked into his waistband. Whaley accompanied Armistead when he threatened defendant. Both Armistead and Whaley admitted membership in the East Coast Crips.

Defendant had paid some money to the East Coast Crips. He also had reported the matter to the police, but they told him they could not do anything about it until something happened.

On September 24, 2005, Armistead came into the store to make a purchase. When Rodriguez, who was busy helping other customers, did not help Armistead right away, he made a crude threat to her. Rodriguez told defendant about the incident.

Armistead returned to the store the following day, shortly before closing time. Whaley and several other men accompanied him. Emilio Garcia (Garcia), who lived near the store, saw a car park in his driveway and three men wearing baggy clothes get out. They looked upset. As they walked toward the store, they were joined by other men walking toward the store. After they entered the store, a customer, Virginia Ruiz,[1] observed that one of the men had a gun. When Rodriguez saw the men enter, she called out to defendant, "He's back, he's back."

Defendant walked to the front of the store from the stockroom in back. He had a .38 caliber revolver in his pocket. He kept it with him for protection when he was closing the store at night.

Armistead confronted defendant at the entrance to the store, yelling that he was an East Coast Crip. He pushed defendant back into the store from the front, while Whaley

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[1] Virginia Ruiz acknowledged that she had a relationship with defendant's family, and that prior to June 2006, she did not tell anyone that she was present in the store at the time of the incident.

got behind defendant. Armistead reached toward his waistband while Whaley grabbed defendant and pulled him downward. Thinking that Armistead was reaching for the gun he had earlier shown defendant, defendant grabbed his gun and shot Armistead. He then turned around and shot Whaley.

Rodriguez was screaming, and defendant attempted to calm her. She told him he had to leave the store. He did so. He later talked to the police by telephone, then he went to the police station to turn himself in.

Garcia heard the gunshots about five minutes after he saw the car park in his driveway. He saw one man, who appeared to be injured, return to the car. It then drove away.

Defendant acknowledged that he never saw Armistead or Whaley with a gun that night. He also admitted shooting Whaley three times but denied shooting Whaley as Whaley ran away; defendant did not know how Whaley suffered a gunshot wound to his back. In addition, defendant admitted he knew it was unlawful for him, as a convicted felon, to possess a gun.

DISCUSSION

A. *Whether the Trial Court Erred in Declaring a Mistrial*

Defendant's first trial began on June 7, 2006. The jury began deliberating on June 19. They deliberated on June 20, with deliberations including a readback of some of the testimony. The jury continued deliberations on June 21. That afternoon, they sent a note to the trial court indicating they had reached verdicts on counts 1 and 3, but they were deadlocked as to count 2.

The trial court took a partial verdict as to counts 1 and 3. It questioned the jury foreperson as to the breakdown on count 2. The foreperson responded that the jury had taken three votes on count two, and it had been ten to two each time. The trial court asked the jury to continue deliberating on count two, explaining that they had not been deliberating for that long a time considering the length of the case. If the jury made a

good faith effort to reach a verdict on count 2 but was unable to do so, it should let the court know.

The jury deliberated the rest of the afternoon and the following morning. Early in the afternoon on June 22, the jury notified the court they were still deadlocked at ten to two. The court asked the foreperson if there was any chance that further deliberations would enable the jury to reach a unanimous decision; the foreperson replied, "no." The court asked if there was anything further it could do to assist the jury; again the foreperson replied, "no." The court questioned the rest of the jurors, and they all answered, "no."[2] At that point, the court declared a mistrial.

It is defendant's contention that his retrial on count 2 was barred by the double jeopardy clause. (Cal. Const., art. I, § 15.) He reasons that since he did not consent to declaration of a mistrial and discharge of the first jury, and the trial court did not follow the proper procedure in finding a mistrial a legal necessity, the discharge of the first jury barred a retrial. We disagree.

Since jeopardy attaches when the jury is impaneled, "if a jury is discharged without returning a verdict, the defendant cannot be retried unless the defendant consented to the discharge, or manifest necessity required it." (*People v. Fields* (1996) 13 Cal.4th 289, 299.) The Penal Code thus provides that once a jury has been impaneled, it cannot be discharged except by consent of the parties or by the trial court if "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (Pen. Code, § 1140.) If the jury is discharged for cause, the case may be retried. (*Id.*, § 1141.)

The decision whether to declare a mistrial and discharge the jury rests within the sound discretion of the trial court. (*People v. Breaux* (1991) 1 Cal.4th 281, 319.) Defendant argues, based on the Reporter's Transcript of the proceedings, that the trial court did not ascertain that there was no reasonable probability that the jury could agree

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[2] At that point, the foreperson revealed that the breakdown was ten votes for acquittal and two for conviction.

on a verdict on count 2, and it therefore abused its discretion in declaring a mistrial. However, the Augmented Reporter's Transcript, which was prepared and filed after defendant filed his brief, shows that the trial court did, in fact, question the jury as to the probability of reaching a verdict as to count 2. The members of the jury unanimously agreed that there was no possibility of reaching a verdict—they remained deadlocked at ten to two. The trial court therefore did not abuse its discretion in finding no reasonable probability that a verdict could be reached and in declaring a mistrial. (See, e.g., *People v. Byers* (1979) 90 Cal.App.3d 140, 152.)

B. *Whether Collateral Estoppel Barred Retrial of Count 2*

Defendant argues that his acquittal on count 1 meant that the first jury conclusively determined that he acted in self-defense. The determination that he acted in self-defense, he contends, barred his retrial on count 2. Again, we disagree.

The Fifth Amendment guarantee against double jeopardy incorporates principles of collateral estoppel. (*Ashe v. Swenson* (1970) 397 U.S. 436, 445.) It provides that once "an issue of ultimate fact" has been resolved in a criminal proceeding, it cannot be relitigated in a subsequent prosecution. (*Id*. at pp. 443, 447.)

In *Ashe v. Swenson*, *supra*, several masked gunmen robbed a group of six men who were playing poker. Defendant was charged with robbing one of the six victims. A jury found him not guilty based on insufficient evidence. (397 U.S. at pp. 437-439.) The prosecution then charged defendant with robbing another of the victims. Defendant moved for dismissal of the charge based upon his previous acquittal. The court overruled the motion, after which defendant was convicted. (*Id*. at pp. 439-440.)

The Supreme Court found that the only basis for defendant's acquittal at the first trial was a lack of proof of defendant's identity as one of the robbers. The prosecution therefore was collaterally estopped from retrying the issue of defendant's identity as one of the robbers. (*Ashe v. Swenson*, *supra*, 397 U.S. at p. 445.) Inasmuch as collateral estoppel principles are "embodied in the Fifth Amendment guarantee against double jeopardy," once "a jury determined by its verdict that [defendant] was not one of the

robbers, the State could [not] hale him before a new jury to litigate that issue again." (*Id*. at pp. 445-446.) That the prosecution involved a different victim was irrelevant; under the circumstances, the identity of the victim had no bearing on the identity of the robber. (*Id*. at p. 446.)

The situation in the instant case is different. Defendant's acquittal of the killing of Armistead did not preclude a finding he committed a crime against Whaley. A jury could determine that defendant shot Armistead, whom he previously had seen with a gun and whom he believed was reaching for a gun, in self-defense, but not acted in self-defense when he shot Whaley, whom he had not previously seen with a gun and who did not appear to be reaching for a weapon. Additionally, defendant shot Armistead once in the chest but shot Whaley three times: in the chest at close range, and in the back and arm at a greater distance. This too provides a basis for determining that defendant did not act in self-defense when shooting Whaley, even if he shot Armistead in self-defense. Since the question whether defendant acted in self-defense when shooting Whaley was not necessarily decided in the first trial, retrial on count 2 was not barred by collateral estoppel. (*Ashe v. Swenson*, *supra*, 397 U.S. at pp. 445-446.)

C. *Whether the Trial Court Erred in Failing to Instruct the Jury that Defendant Previously Was Acquitted on Count 1*

Defendant requested that Lagunas not be allowed to testify, in that her testimony related to the shooting of Armistead, and defendant was acquitted in Armistead's killing. The trial court denied that request but stated that it would consider instructing the jury that defendant was acquitted on count 1.

After considering the matter, the trial court decided not to instruct the jurors that defendant had been acquitted on count 1. It explained that the factual findings of the first jury were not binding on the second jury. It would, however, instruct the jury not to be concerned with whether defendant had been or would be prosecuted for Armistead's death. It subsequently instructed the jury to that effect.

Defendant argues, with no supporting authority, that the trial court's failure to instruct the jury as to his acquittal on count 1 resulted in a miscarriage of justice "because the trial court instructed the jury to do something that it could not do. The trial court presented the jury with a ravelment [*sic*] that no jury could decipher and that led to the untenable conviction of [defendant]."

As the People point out, courts have routinely given CALJIC No. 2.11.5, which instructs a jury not to consider whether another person who may have been involved in the crime has been or will be prosecuted for the crime. We presume the jury has followed this instruction and not considered why the other person was not being prosecuted. (See *People v. Malone* (1988) 47 Cal.3d 1, 51; *People v. Williams* (1988) 45 Cal.3d 1268, 1313; *People v. Romo* (1975) 14 Cal.3d 189, 195.) If a jury is capable of following this instruction, we see no reason why it should be incapable of following an instruction not to consider why defendant is not being prosecuted for another possible crime.

Moreover, as we discuss *post*, there is sufficient evidence to support defendant's conviction. The conviction therefore is not "untenable."

D. *Whether the Exclusion of Gang Evidence Deprived Defendant of a Fair Trial*

Defendant sought to introduce the testimony of Officer Broussard that Whaley had told the officer that he was a member of the East Coast Crips. The trial court ruled that this testimony would be inadmissible. The court explained that the evidence was "not relevant as to [defendant's] state of mind because it's not as if [defendant] had knowledge that Whaley admitted to people, whether the gang officer or other individuals, that he—he is a member of that gang. It doesn't really go to his fear." The trial court left open the opportunity for defendant to introduce Officer Broussard's testimony if the officer had

additional information concerning Whaley, such as a character trait for violence, which would be admissible under Evidence Code section 1103.[3]

We start our analysis with the rule that only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is that which has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (*Id*., § 210.) The trial court has the duty to determine the relevance and thus the admissibility of evidence before it can be admitted. (*Id*., §§ 400, 402.) We review the trial court's determination as to admissibility that turns on relevance for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717.)

Defendant starts his argument with the general proposition that expert evidence is admissible on "the culture and habits of criminal street gangs." (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) He then claims that here, "there is no dispute that the foundation of the proffered expert testimony was sufficient. Courtney Whaley admitted to Officer Broussard that he was a member of the East Coast Crips."

Defendant did not seek to introduce evidence as to criminal street gang culture and habits. The trial court asked defense counsel for an offer of proof to be sure it knew exactly what testimony he sought to introduce. The trial court asked: "I actually want to understand your offer of proof a little better. You said that you were going to call a gang expert to come and testify . . . that Mr. Whaley, the victim as to count 2 on the prior occasion had admitted to this witness, a police officer, that he was a member of a gang; right?" Counsel responded: "Yes, your honor." The court asked: "Is that the only offer of proof that you have as to that area?" Defense counsel responded: "Yes. He admitted it to that officer; and just in the context of there's going to be gang references at various points throughout the trial, and that officer not only had the admission made to him, but he's also a gang officer. So he had talked about . . . what East Coast Crip gang is.

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[3] Evidence Code section 1103 permits the admission of a character trait of the victim to prove conduct in conformity with that trait.

Otherwise, the jury's just going to hear a term without having any substance to put to it on."

Defendant sought to introduce evidence that Whaley admitted he was a member of a criminal street gang. As the trial court noted, evidence that Whaley was a gang member was not relevant to any disputed issue at trial. Rather, the question was whether defendant believed him to be a gang member and for that reason feared Whaley. Defendant was allowed to testify as to his belief that Whaley was a gang member and the reason for his fear of Whaley, including the prior extortion and threats by Armistead and other members of the East Coast Crips, including Whaley.

Contrary to defendant's argument, that Whaley admitted membership in the East Coast Crips was *not* "extremely relevant and probative of the threat that was posed to [defendant] that night." Rather, that Whaley accompanied Armistead when Armistead threatened defendant was relevant and probative of the threat posed to defendant. This evidence was admitted. We consequently find no abuse of discretion in the trial court's decision not to admit the proffered testimony of Officer Broussard.

E. *Whether Sufficient Evidence Supports the Verdict*

"To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary

conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

In applying this standard of review, however, we start with the presumption that the record contains substantial evidence supporting every finding of fact. (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) "'Defendant['s] contention herein "requires defendant[] to demonstrate that there is *no* substantial evidence to support the challenged findings." (Italics added.) [Citations.] A recitation of only defendant['s] evidence is not the "demonstration" contemplated under the above rule. [Citation.] Accordingly, if, as defendant[] here contend[s], "some particular issue of fact is not sustained [he is] required to set forth in [his] brief *all* of the material evidence on the point and *not merely [his] own evidence*. Unless this is done the error is deemed to be waived."'" (*Ibid*.)

Defendant fails to make the required demonstration. In his statement of facts, he recites only his own evidence. In his discussion, he does not even attempt to point to the evidence which he claims is insufficient to prove malice aforethought. He merely claims, in a conclusory fashion, that the evidence is insufficient.

As noted in *People v. Dougherty*, *supra*, 138 Cal.App.3d at page 283, "'"Instead of a fair and sincere effort to show that the [verdict] was wrong, appellant's brief is a mere challenge to respondent[] to prove that the [verdict] was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondent[]. An appellant is not permitted to evade or shift his responsibility in this manner."' [¶] . . . [¶] . . . 'We do not even attempt to appraise the loss to the taxpayers reflected by the value of the wasted time of the members of the staff of this court in attempting to review an appeal which, under court rules, is deemed unintelligible.'" We therefore deem defendant's contention to have been waived.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.